

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	No. CR 07-336 WHA (BZ)
)	
v.)	ORDER OVERRULING DEFENDANT
)	BIBBS'S OBJECTION TO THE
MAURICE BIBBS,)	GOVERNMENT PROCEEDING AT THE
)	DETENTION HEARING BY WAY OF
Defendant.)	PROFFER
_____)	

At his initial appearance on May 31, 2007, the Government moved to detain Mr. Bibbs and a hearing was scheduled for June 7, 2007. Defendant objected to the Government proceeding by way of proffer at the detention hearing, and filed a memorandum supporting his objection. Defendant renewed his objection at the June 7 hearing, and requested that I issue subpoenas for the Government's witnesses. Essentially, defendant argues that under Crawford v. Washington, 541 U.S. 36 (2004), allowing the government to proceed by proffer violates his Sixth Amendment right of confrontation.

Prior to Crawford, the Ninth Circuit and every other circuit of which I am aware, had ruled that "the government may proceed in a detention hearing by proffer or hearsay."

1 U.S. v. Winsor, 785 F.2d 755, 756 (9th Cir. 1986) (citations
2 omitted); see also U.S. v. Smith, 79 F.3d 1208, 1210 (D.C.
3 Cir. 1996) (collecting cases). Crawford rejected the use of
4 hearsay testimony at **trial** as violating a defendant's Sixth
5 Amendment right to confront his accusers. See 541 U.S. at 50-
6 51 ("[W]e once again reject the view that the Confrontation
7 Clause applies of its own force only to in-court testimony,
8 and that its application to out-of-court statements introduced
9 at *trial* depends upon 'the law of Evidence for the time
10 being.'" (emphasis added); id. at 53-54 ("[T]he Framers would
11 not have allowed admission of testimonial statements of a
12 witness who did not appear at *trial* unless he was unavailable
13 to testify, and the defendant had had a prior opportunity for
14 cross-examination.") (emphasis added); id. at 59. The Ninth
15 Circuit recently described Crawford as "speaking to trial
16 testimony." U.S. v. Littlesun, 444 F.3d 1196, 1199 (9th Cir.
17 2006).¹

18 Nothing in Crawford requires or even suggests that it be
19 applied to a detention hearing under the Bail Reform Act,
20 which has never been considered to be part of the trial.
21 Shortly after the Bail Reform Act was passed, the Supreme
22 Court held that a detention hearing is not a "criminal
23 prosecution" to which the Sixth Amendment applies. See U.S.
24 v. Salerno, 481 U.S. 739, 746-52 (1987) (emphasizing the
25 regulatory purpose of pre-trial detention); see also U.S. v.
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27 ¹ While Littlesun dealt with sentencing hearings, not
28 detention hearings, the court's description of the holding of
Crawford applies with equal force.

1 Ebro, 948 F.2d 1118, 1121-22 (9th Cir. 1991) ("[T]he bail
 2 statute neither requires nor permits a pretrial determination
 3 of guilt."); Windsor, 785 F.2d at 756-57 (9th Cir. 1986)
 4 (defendant has no right to cross-examine adverse witnesses not
 5 called to testify in detention hearing); cf. U.S. v. Hall, 419
 6 F.3d 980 (9th Cir. 2005) (Sixth Amendment does not apply to
 7 revocation hearing on supervised release).

8 Defendant has cited no authority (post-Crawford or
 9 otherwise), and I have found none, for the proposition that
 10 the Sixth Amendment right to confront witnesses applies in a
 11 detention hearing. To the contrary two other judges of this
 12 court have ruled that Crawford did not alter the procedures
 13 for conducting detention hearings under the Bail Reform Act.
 14 See U.S. v. David Henderson, CR 05-672 MHP (EMC) (Order of
 15 Detention Pending Trial, Docket No. 11); U.S. v. Leonardo
 16 Henderson, CR 05-609 JSW (ECL) (Order of Detention Pending
 17 Trial, Docket No. 12).² I therefore reject defendant's Sixth
 18 Amendment argument.

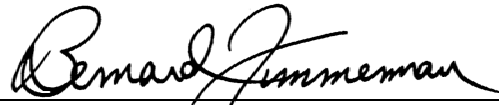
19 I also reject defendant's argument that the due process
 20 clause requires me to allow defendant to subpoena the
 21 Government's witnesses for cross-examination. Without
 22 explaining the source of the right, Windsor suggests that

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 24 ² In U.S. v. Abuhamra, 389 F.3d 309 (2nd Cir. 2004),
 25 the court held that the District Court's reliance on
 26 information it received ex-parte and in camera information to
 27 deny bail violated defendant's due process rights and the
 28 public's Sixth Amendment right to a public hearing. The
 viability of Abuhamra in the Ninth Circuit is not clear. See
U.S. v. Terrones, 712 F. Supp. 786 (S.D. Cal. 1989) (relying on
 information received in camera to detain defendant), conviction
 aff'd in U.S. v. Sanchez, 908 F.2d 1443 (9th Cir. 1990). In
 any event, the Second Circuit in Abuhamra did not reach the
 Sixth Amendment confrontation clause.

1 where facts material to the detention decision are in dispute,
2 a defendant may have a right to cross-examine adverse
3 witnesses. See 785 F.2d at 756-57. At the hearing, counsel
4 generally denied defendant's guilt but proffered little in the
5 way of specific, material factual disputes. Neither the Ninth
6 Circuit nor Congress intends the detention hearing to serve as
7 a mini-trial on the ultimate question of guilt. At any rate,
8 as explained in my separate detention order, I relied almost
9 exclusively on non-disputed facts to justify detention.

10 For the foregoing reasons, defendant's objection to the
11 Government's use of proffers is **OVERRULED**.

12 Dated: June 8, 2007

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14 Bernard Zimmerman
United States Magistrate Judge

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